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## Annual Survey of Virginia Law: Environmental Law

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## ENVIRONMENTAL LAW

*James E. Ryan, Jr.\**

### I. INTRODUCTION

This article addresses significant developments in Virginia law pertaining to air and water pollution, solid and hazardous waste, and environmentally sensitive areas which have occurred between the publication of last year's survey<sup>1</sup> and August 1, 1990.

### II. AIR

#### A. *Legislation*

The 1990 General Assembly passed legislation continuing the Department of Air Pollution Control ("DAPC") as an agency within the Secretariat of Natural Resources.<sup>2</sup> The legislation enumerated the powers, duties and responsibilities of the Department and the Executive Director.<sup>3</sup> Also, the General Assembly required an applicant for a permit for a new or stationary air pollution source to provide DAPC with notification from the governing body of the county, city or town in which the source is to be located that the location and source are consistent with local planning and zoning ordinances.<sup>4</sup>

#### B. *Administrative Proceedings*

The State Air Pollution Control Board (SAPCB) has proposed new regulations establishing an operating permit for new and existing sources.<sup>5</sup> The SAPCB is also in the process of revising its

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1. Kingsley, *Environmental Law: Annual Survey of Virginia Law*, 23 U. RICH. L. REV. 625 (1989).

2. VA. CODE ANN. § 10.1-1307.1 (Cum. Supp. 1990).

3. *Id.* § 10.1-1307.2.

4. *Id.* § 10.1-1321.1.

5. 5:21 Va. Regs. Reg. 3173 (1989).

non-criteria (toxic) pollutant regulations.<sup>6</sup>

### III. SOLID AND HAZARDOUS WASTE

#### A. Legislation

The General Assembly significantly increased the regulation of non-hazardous solid waste facilities, which may not be operated without a permit from the Director of the Department of Waste Management ("DWM").<sup>7</sup> The permit application must now disclose important information<sup>8</sup> on any person employed in a managerial capacity or empowered to make discretionary decisions.<sup>9</sup> An applicant must update this disclosure statement quarterly while his application is pending. Every current permit holder must file a disclosure statement by July 1, 1991.<sup>10</sup>

Permits may be revoked if a violation is representative of a pattern of serious or repeated violations, or if any key personnel have been adjudged in violation of environmental protection laws of the United States or any state and such violation or conviction is sufficiently probative of an inability or unwillingness to operate the facility in a lawful manner.<sup>11</sup> Permits may also be revoked as a result of changes in key personnel, or if the applicant knowingly misrepresented a material fact in his disclosure statement.<sup>12</sup>

The civil penalty for each day of violation of any hazardous or solid waste statute, regulation, permit condition or order has been increased to \$25,000.<sup>13</sup> If the violation involves hazardous waste and is knowing, the penalties have been increased even more. For a knowing violation involving hazardous waste, the violator is guilty of a felony punishable by a minimum imprisonment of one year

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6. *Id.* at 3172.

7. VA. CODE ANN. § 10.1-1408.1 (Cum. Supp. 1990).

8. This information must include the full name, business address, social security number, a description of the business experience, relevant permits held within the past ten years, any notices of any violations of any relevant regulations within the past ten years which are pending or have concluded with a finding of violation or consent agreement, all convictions within ten years of enumerated felonies, and any other information that the Director may require that "reasonably relates to the [individual's] qualifications and ability . . . to lawfully and competently operate a solid waste management facility." *Id.* § 10.1-1400.

9. These persons are called "key personnel." *Id.*

10. *Id.* § 10.1-1408.1(c)(1). The provision does not expressly require that each current permit holder also must update its disclosure statement quarterly.

11. *Id.* § 10.1-1409.

12. *Id.* § 10.1-1409(7), (8).

13. *Id.* § 10.1-1455(A).

and a maximum of five, a fine of \$25,000, either or both.<sup>14</sup> If the violation involves hazardous waste and the violator knows that he places another in imminent danger of death or serious bodily injury, he is guilty of a felony punishable by a minimum imprisonment of two years and a maximum of fifteen, a fine of not more than \$250,000, either or both.<sup>15</sup> For any subsequent conviction the maximum penalties are doubled.<sup>16</sup> For a defendant that is not an individual, the maximum fine is the greater of \$1,000,000 or three times the economic benefit realized as a result of the offense.<sup>17</sup>

The General Assembly made two other changes to make it easier to bring an action against a polluter. First, it defined "nuisance" to include "dangerous or unhealthy substances which have escaped, spilled, been released or which have been allowed to accumulate in or on any place," and permitted any local government to compel a responsible party to abate a public nuisance.<sup>18</sup> Secondly, the General Assembly created an action for "improper disposal of solid waste." The landowner or, if the waste is improperly disposed of upon land owned by the Commonwealth, any resident, may bring the action.<sup>19</sup>

The General Assembly created a defense which protects a defendant from liability for cleanup of sites contaminated by solid or hazardous waste where the damage was caused by an unrelated third party and the defendant can show that he exercised due care and took precautions against foreseeable acts of any such third party.<sup>20</sup>

In an effort to reduce problems associated with solid waste disposal, the General Assembly adopted several measures promoting recycling. The DWM must expedite applications for permits to accept a newly created category of solid waste, recycling residue, which includes the waste remaining after removing metal from

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14. *Id.* § 10.1-1455(B).

15. *Id.*

16. *Id.* § 10.1-1455(H).

17. *Id.*

18. *Id.* § 15.1-29.21 (Supp. 1990). Furthermore, if the nuisance "presents an imminent and immediate threat to life or property" the local government may abate and bring an action against the responsible party to recover costs. *Id.*

19. *Id.* § 10.1-1418.1. The act creates a rebuttable presumption that the defendant improperly disposed of the waste if the plaintiff establishes by a preponderance of the evidence that the defendant had possessed the waste and had not been given permission to dispose of the waste on the property.

20. *Id.* § 10.1-1406.

solid waste or after the production of a refuse derived fuel.<sup>21</sup> This recycling residue will count toward the recycling targets established by the regional waste management plans developed under section 10.1-1411 of the Code of Virginia (the "Code").<sup>22</sup> The Board of Waste Management ("BWM") must also encourage yard waste composting facilities by allowing reasonable exemptions from permitting requirements,<sup>23</sup> and local jurisdictions may prohibit the disposal of leaves or grass clippings in any landfill if the composting program is capable of handling them.<sup>24</sup> Local jurisdictions may require certain types of solid waste to be disposed of in authorized facilities,<sup>25</sup> businesses to separate waste by type for recycling,<sup>26</sup> and, to facilitate the regional waste management plans, may require solid waste generators to report annually information regarding recycling.<sup>27</sup>

The General Assembly directed the DWM to grant exemptions from the minimum recycling rates specified in the regional waste management plans when market conditions make such rates unreasonable.<sup>28</sup> Each state agency and university must establish a recycling program.<sup>29</sup> Lead and batteries may be disposed of only in authorized recycling facilities.<sup>30</sup>

#### B. *Administrative Proceedings*

The DWM's regulations for the development of regional solid waste management plans became effective May 15, 1990.<sup>31</sup> The purpose of these regulations is to ensure that each region, and each city, town and county not part of such a region develop comprehensive and integrated plans for the management of solid waste.<sup>32</sup> These plans must consider the following hierarchy: 1) source reduction, 2) rescue, 3) recycling, 4) resource recovery (waste to en-

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21. *Id.* §§ 10.1-1400, -1408.1.

22. *Id.* § 10.1-1411.

23. *Id.* § 10.1-1408.1.

24. *Id.* § 15.1-11.5.1 (Supp. 1990).

25. *Id.* § 15.1-11.

26. *Id.* § 15.1-11.5.

27. *Id.* § 15.1-11.5:2.

28. *Id.* § 10.1-1411.

29. *Id.* § 10.1-1425.6.

30. *Id.* § 10.1-1425.1.

31. 6:14 Va. Regs. Reg. 2140 (1990).

32. *Id.* at 2143-44, § 2.3(1).

ergy), 5) incineration, 6) landfilling, and 7) plan implementation.<sup>33</sup>

The regulations designate the objectives and necessary elements of solid waste management plans. Cities or towns can develop plans individually, or participate in an authorized regional plan.<sup>34</sup> Plans must be submitted by July 1, 1991.<sup>35</sup> Some of the elements to be incorporated are funding, integrated strategy, site identification, public information and participation and waste stream analysis. Mandatory goals for recycling rates and the method of calculation are also established.<sup>36</sup> The regulations establish procedures for considering rule making petitions and the issuance of variances.<sup>37</sup>

After July 1, 1992, no permit for a solid waste facility will be issued unless a local or regional application is in effect.<sup>38</sup> When there is a mutually exclusive conflict between the Regulations for the Development of Solid Waste Management Plans and other adopted nonhazardous solid waste management regulations the former prevail.<sup>39</sup> Beginning July 1, 1997 and every five years thereafter, a report updating the plan must be submitted for the Department's approval.<sup>40</sup>

On November 2, 1989, the Department adopted regulations which became effective May 2, 1990<sup>41</sup> for the management of infectious wastes. "Infectious waste" includes cultures, blood, pathological wastes, sharps, animal carcasses, or any other solid waste capable of producing an infectious disease in humans.<sup>42</sup> Exempt from these regulations are those wastes which are regulated by other agencies such as the State Board of Health or State Water Control Board, in addition to specifically authorized waste of health care professionals who generate waste in their office or the private home of a patient.<sup>43</sup> Excluded from the definition of solid or infectious waste are (for example) domestic sewage, human remains properly interred in a cemetery, wastes contaminated with organisms not generally recognized as pathological to humans, and used products

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33. *Id.* § 2.2.

34. *Id.* at 2145.

35. *Id.* § 3.1(b).

36. *Id.* at 2145-46, § 3.2(A)-(C).

37. *Id.* at 2149-50.

38. *Id.* at 2144, § 2.6(C).

39. *Id.* at 2144-45, § 2.8.

40. *Id.* at 2145, § 3.1(F).

41. 6:5 Va. Regs. Reg. 741 (1990).

42. *Id.* at 748-49, § 3.4-3.5.

43. *Id.* at 747-48, § 3.2.

for personal hygiene.<sup>44</sup>

A permit is required for the management of infectious wastes,<sup>45</sup> unless the facility qualifies for a permit-by-rule<sup>46</sup> in which case it is already deemed to be operating under a permit for infectious waste. To qualify for a permit-by-rule, a facility must be in compliance with all parts of the regulations except section 9.<sup>47</sup> Seventy-five percent of all waste that is stored, treated or disposed of by the facility must be generated on-site; no infectious waste may be transported or received without being properly packaged; no infectious waste can be placed in the ground; and the owner/operator of the facility must inform the Executive Director of DWM that the facility is operating under a permit-by-rule.<sup>48</sup>

Other general requirements for the management of infectious waste include requirements for financial assurance,<sup>49</sup> packaging and labeling,<sup>50</sup> management of spills,<sup>51</sup> closure,<sup>52</sup> treatment and disposal,<sup>53</sup> testing,<sup>54</sup> and recordkeeping.<sup>55</sup> These regulations also contain special requirements for the storage,<sup>56</sup> transportation,<sup>57</sup> incineration,<sup>58</sup> and steam sterilization<sup>59</sup> of infectious waste.

### C. *Judicial Activities*

In the Circuit Court of Chesterfield County, the court sustained the county's demurrer to a landfill operator's claim that the county's attempt to close the landfill was pre-empted by state authority.<sup>60</sup> In April 1984, the landfill operator was issued a solid

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44. *Id.* at 748, § 3.3(A)-(C).

45. *Id.* at 749, § 4.1(A).

46. *Id.* at 749-50, § 4.1(B).

47. *Id.* at 757, §§ 9.1-9.23. (These are the formal permit application and issuance procedures).

48. *Id.* at 749-50, § 4.1(B).

49. *Id.* at 750, § 4.2.

50. *Id.* at 750-51, § 4.3.

51. *Id.* at 751-52, § 4.4.

52. *Id.* at 752, § 4.5.

53. *Id.* § 4.6.

54. *Id.* § 4.7.

55. *Id.* at 752-53, § 4.8.

56. *Id.* at 753, §§ 5.1-5.5.

57. *Id.* at 753-55, §§ 6.1-6.9.

58. *Id.* at 755-76, §§ 7.1-7.5.

59. *Id.* at 756, §§ 8-1-8.3.

60. *Lawless v. Board of Supervisors*, No. CH89-448 (Chesterfield County Nov. 1, 1989) (ltr. op.).

waste management permit by the DWM to operate a debris landfill. Several months later, the Board of Supervisors of Chesterfield County (the "Board") granted the operator a conditional use permit authorizing a landfill on the property for a period of five years. The conditional use permit prohibited the acceptance of certain wastes allowed by the state permit. During an inspection of the landfill in November 1988, the operator was found in violation of the conditional use permit, although the landfill was within the uses authorized by the state permit. In March 1989, the Board revoked the conditional use permit granted in 1984 and ordered that all landfill activity on the property be terminated immediately.<sup>61</sup>

Plaintiff argued that the Board did not have express authority to revoke the conditional permit and, therefore, the Board's action was in violation of Dillon's Rule<sup>62</sup> and *ultra vires*.<sup>63</sup> Furthermore, plaintiff alleged, the county was pre-empted by the State Waste Management Act from issuing a conditional use permit more restrictive than the permit issued by the state.<sup>64</sup>

Regarding the authority of the county to revoke the conditional use permit, the court noted that the General Assembly granted localities and towns the authority to regulate the manner in which solid waste facilities are operated and maintained.<sup>65</sup> It also noted that section 15.1-857 of the Code grants this same power and authority to each county board of supervisors.<sup>66</sup> The court held that it was "apparent from these provisions that the Waste Management Act does not pre-empt the County from regulating land use where solid landfills are concerned, but instead recognizes and provides for a localities [sic] authority to regulate land use."<sup>67</sup> Thus, the court concluded, both the DWM and local governments possess the power to regulate solid waste facilities and when both regulate the same subject matter, "effect should be given to both by harmonization."<sup>68</sup>

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61. *Id.* at 2.

62. Dillon's Rule holds that local governments have only those powers expressly conferred by the state legislature, those necessarily and fairly implied from an express grant, and those essential and indispensable. *See Commonwealth v. Arlington County Bd.*, 217 Va. 558, 232 S.E.2d 30 (1977).

63. *Lawless*, *ltr. op.* at 2.

64. *Id.*

65. *Id.* at 3; *see generally* VA. CODE ANN. § 15.1-857 (Repl. Vol. 1989).

66. *Lawless*, *ltr. op.* at 3.

67. *Id.* at 4.

68. *Id.*



In *Kim-Stan, Inc. v. Department of Waste Management*,<sup>69</sup> the federal district court determined that it did not have jurisdiction over a sanitary landfill operator's suit to enjoin enforcement of the State Water Control Board's (SWCB) emergency special order that closed a landfill after leachate discharges resulted in a fish kill.<sup>70</sup> The court found that abstention from jurisdiction was proper because (1) state proceedings had begun prior to substantial federal court proceedings on the merits;<sup>71</sup> (2) the state proceedings gave an opportunity for federal claims to be heard; and (3) important state interests were at stake. In addition, no bad faith exception was demonstrated.<sup>72</sup>

The court held that the "ongoing" state proceeding requirement was met by the SWCB's June 6 emergency order which expressly mandated a formal hearing.<sup>73</sup> The court noted that SWCB's bill of complaint filed in state court also constituted an "ongoing" state proceeding. The court expressly rejected Kim-Stan's assertion that the temporary restraining order issued by the federal magistrate on June 16, 1989, constituted the commencement of a substantive proceeding in Federal Court.<sup>74</sup> Furthermore, the court found that both actions by the SWCB provided Kim-Stan with the opportunity to raise its federal claims in state proceedings.<sup>75</sup>

Finally, the court held that Virginia's intent to protect the health and safety of its citizens clearly indicated that an important state interest was at stake. The court rejected plaintiff's argument that bad faith on the Department of Waste Management's part made federal jurisdiction appropriate.<sup>76</sup>

In *Bryant v. Colonial Pipeline Company*,<sup>77</sup> the federal court, in denying defendant's motion to dismiss, considered whether petroleum waste comes within the "petroleum exclusion" of the Com-

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69. 732 F. Supp. 646 (E.D. Va. 1990).

70. *Id.*

71. *Id.* at 649. On June 6, 1989, in response to a fish kill, the State Water Control Board issued an Emergency Special Order closing the landfill because of the discharge. This order facilitated proceedings for a formal hearing. On June 23, 1989 the Commonwealth, on behalf of the SWCB, filed a bill of complaint in the Circuit Court of Alleghany County seeking temporary and permanent injunctions and a judgment for civil penalties against Kim-Stan. *Id.* at 647-48.

72. *Id.* at 648-49.

73. *Id.* at 649.

74. *Id.* at 650.

75. *Id.* at 652.

76. *Id.*

77. No. 88-0208-L (W.D. Va. Aug. 7, 1989) (mem. op.).

prehensive Environmental Response Compensation and Liability Act ("CERCLA").<sup>78</sup> Defendant, operator of a petroleum pipeline, had deposited waste sludge at plaintiff's landfill. Plaintiffs filed a declaratory judgment action alleging that defendants were liable for response costs under CERCLA for cleanup of the site in question. In its motion to dismiss, defendant asserted the petroleum sludge was not a "hazardous substance" as defined in CERCLA.

The district court ruled that the "petroleum exclusion" does not apply to all waste products containing petroleum.<sup>79</sup> Instead, the court found that the Environmental Protection Agency ("EPA") distinguishes between contaminated petroleum products not within the petroleum exclusion and uncontaminated petroleum products (within the petroleum exclusion). The EPA defines uncontaminated petroleum as petroleum which "includes hazardous substances normally found in refined petroleum fractions but does not include either hazardous substances found at levels which exceed those normally found in such fractions or substances not normally found in fractions."<sup>80</sup> Thus, according to the court, if defendants' petroleum sludge was found to contain "hazardous substances" at levels greater than those normally occurring in petroleum products, the sludge would not come within CERCLA's "petroleum exclusion." The court denied the motion to dismiss noting that content of the petroleum sludge was a factual question not yet resolved.<sup>81</sup>

#### IV. WATER

##### A. Legislation

The General Assembly strengthened the authority of the State Water Control Board ("SWCB") over the Virginia Pollution Discharge Elimination System ("VPDES"). The term of a VPDES permit cannot be longer than five years, and the SWCB may re-

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78. 42 U.S.C. § 9601(4) (1988). CERCLA expressly excludes from the coverage of the Act "petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance. . ." even though petroleum products contain constituents specifically listed as hazardous substances under CERCLA. 42 U.S.C. § 9601 (14).

79. *Bryant*, mem. op. at 5.

80. *Id.* at 6 (quoting EPA's General Counsel's Opinion of July 31, 1987, "Scope of the CERCLA Petroleum Exclusion under Sections 101(14) and 104(a)(2)," 14 CHEM. WASTE LITIG. REP. 842 (1987)).

81. *Bryant*, mem. op. at 7.

voke a permit for virtually any violation.<sup>82</sup> A court is required to issue an injunction if the SWCB issues an emergency special order based on a finding of "immediate and substantial danger" to all reasonable uses of water.<sup>83</sup> The penalties for a violation were also increased.<sup>84</sup> The penalty for a willful or negligent violation is a misdemeanor punishable by up to a year in jail, a fine of between \$2,500 and \$25,000, or both.<sup>85</sup> The penalty for a knowing violation is a felony punishable by one to three years in jail, or up to one year and a fine of \$5,000 to \$50,000.<sup>86</sup> If a person knows that his act places another in imminent danger of serious bodily harm, the penalty is a felony punishable by two to fifteen years in jail, a fine of up to \$250,000, or both.<sup>87</sup> The maximum penalty is doubled for any subsequent conviction.<sup>88</sup>

For owners of underground petroleum storage tanks, the General Assembly adopted per occurrence financial responsibility requirements. All owners and operators and petroleum storage tank vendors will be required to show evidence of financial responsibility for taking corrective action in the amount of \$50,000 per occurrence and for compensating third parties for bodily injury and property damage in an amount of \$150,000 per occurrence.<sup>89</sup> Additionally, the General Assembly adopted a maximum annual aggregate of \$200,000 for accidental releases.<sup>90</sup>

The General Assembly prohibited the discharge of oil into lands or storm drain systems.<sup>91</sup> Before a person stores or handles oil in the Commonwealth, he must file an oil discharge contingency plan demonstrating to the SWCB that the applicant can take such steps as are necessary to protect environmentally sensitive areas and, using the best available technology, contain and clean up an oil dis-

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82. VA. CODE ANN. § 62.1-44.15 (Cum. Supp. 1990). For example the SWCB can revoke the permit if the owner violates any regulation of the Board which is representative of a pattern of repeated violations which, *in the opinion of the Board*, demonstrates the owner's disregard for regulations; if the owner failed to disclose fully all relevant material facts; if the activity endangers human health and can be regulated to acceptable levels; or if there exists a material change which necessitates the revocation to protect the environment. *Id.*

83. *Id.*

84. *See id.* §§ 62.1-44.3, -44.5, -44.15, -44.23, -44.32.

85. *Id.* § 62.1-44.32(b).

86. *Id.*

87. *Id.* § 62.1-44.32(c).

88. *Id.*

89. *Id.* § 62.1-44.34:12. (These amounts were formerly the minimum amounts).

90. *Id.*

91. *Id.* § 62.1-44.34:18. The General Assembly previously prohibited the discharge of oil into "state waters." *Id.* § 62.1-44.34:2 (Repl. Vol. 1989).

charge within the shortest feasible time.<sup>92</sup> Furthermore, the applicant must meet specified financial responsibility requirements.<sup>93</sup> The liability for property damage is the greater of \$10,000,000 or the amount of the financial responsibility, unless the discharge was caused by gross negligence or willful misconduct, or the operator failed to report or cooperate in the cleanup.<sup>94</sup>

The civil penalties are specified,<sup>95</sup> and the criminal penalties are similar to those enacted for improper disposal of hazardous wastes and violations of SWCB permits. A knowing violation is a misdemeanor punishable by up to a year in jail, a fine of up to \$100,000, or both.<sup>96</sup> A knowing false statement in any document is a felony punishable by one to three years in jail, a fine of up to \$100,000, or both.<sup>97</sup> A negligent discharge of oil is a misdemeanor punishable by up to one year in jail, a fine of \$50,000, or both.<sup>98</sup> A knowing and willful discharge of oil is a felony punishable by one to ten years in jail, a fine of up to \$100,000, or both.<sup>99</sup> Following a prior felony conviction for a knowing and willful discharge, any violation of this chapter is also a felony, punishable by two to ten years in jail, a fine of up to \$200,000, or both.<sup>100</sup>

The General Assembly also required the Board of Health to exercise due diligence to protect the quality of both surface water and groundwater.<sup>101</sup> The Board of Health was given responsibility for permitting alternative types of sewage systems,<sup>102</sup> and authority to develop criteria for determining the ability of alternative on-site sewage systems.<sup>103</sup>

The General Assembly clarified an ambiguity arising from the 1989 provisions establishing the Virginia Water Protection Permit

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92. *Id.* § 62.1-44.34:15 (Cum. Supp. 1990).

93. *Id.* § 62.1-44.34:16.

94. *Id.* § 62.1-44:18.

95. For failure to obtain approval of an oil discharge contingency plan, \$1,000 to \$50,000 for the initial violation, and \$5,000 per day thereafter; for failure to maintain evidence of financial responsibility, \$1,000 to \$100,000 for the initial violation, and \$5,000 per day thereafter; for failure to cooperate in containment and cleanup of a discharge, \$1,000 to \$50,000, and \$10,000 per day thereafter; for discharging oil, up to \$100 per gallon. *Id.* § 62.1-44.34:20.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* § 32.1-164(A) (Cum. Supp. 1990).

102. *Id.* §§ 32.1-163, -164.

103. *Id.* § 32.1-164(B)(10).

("VWPP") which will replace section 401 certification in Virginia. In 1989, the General Assembly grandfathered withdrawals in existence on July 1, 1989, or which received section 401 certification prior to January 1, 1989. However, it was unclear whether those withdrawals receiving section 401 certification after July 1, 1989, but before the SWCB's regulations for implementation of the Virginia permit program will be required to obtain a VWPP. The clarification provides that no VWPP is required if the withdrawal received section 401 certification containing minimum instream flow requirements after July 1, 1989, but prior to the date regulations implementing this section are effective.<sup>104</sup>

### B. *Administrative Proceedings*

The SWCB adopted financial responsibility requirements for Petroleum Underground Storage Tanks ("UST's") on March 19-20, 1990, effective May 9, 1990.<sup>105</sup> These follow the technical requirements for UST's which went into effect on October 25, 1989.<sup>106</sup>

Although the state regulations essentially track the federal financial responsibility requirements, they differ in several respects. In Virginia, UST owners are required to demonstrate financial responsibility of \$50,000 per occurrence for taking corrective action for accidental releases.<sup>107</sup> Owners are also required to demonstrate financial responsibility of \$150,000 per occurrence to compensate third parties for bodily injury and property damage caused by accidentally releases.<sup>108</sup> These amounts apply regardless of the number of tanks owned and are substantially lower than the federal requirements. Virginia, however, has established the Virginia Underground Petroleum Storage Tank Fund ("VUPSTF"), which satisfies the costs in excess of the above amounts up to one million dollars per occurrence for taking both corrective action and compensating third parties for bodily injury and property damage.<sup>109</sup>

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104. *Id.* § 62.1-44.15:5 (Cum. Supp. 1990). Unaddressed are those section 401 certifications received between January 1, 1989 and July 1, 1989, if any, for which no withdrawal was in existence on July 1, 1989.

105. 6:14 Va. Regs. Reg. 2150 (1990).

106. 5:26 Va. Regs. Reg. 4103-26. (These are discussed in the 1989 survey article, Kingsley, *supra* note 1.)

107. 6:14 Va. Regs. Reg. 2150, 2153, § 4(A)(1) (1990).

108. As a result, Virginia does not violate federal requirements that the Virginia program be at least as stringent as the federal one. *Id.* at 2153, § 4(A)(2).

109. *Id.* at 2161, § 21.

The fund is also utilized when the owner cannot be identified, the SWCB determines that immediate action is necessary to protect human health and the environment, or when the SWCB determines that the owner is incapable of taking appropriate corrective action.<sup>110</sup>

Costs over one million dollars are paid by the federal government, which then seeks reimbursement from the owner. The SWCB may seek reimbursement for amounts expended by the state fund when the owner has violated substantial environmental protection rules and regulations, and from any person who is liable for injuries and damages.<sup>111</sup>

The Department of Conservation and Recreation has proposed storm water management regulations<sup>112</sup> which apply to all localities establishing storm water management programs as well as to every state agency that, after January 1, 1991, engages in land clearing, soil movement, or land development.<sup>113</sup> The regulations, whose purpose is to achieve effective control of precipitation runoff from land development projects,<sup>114</sup> specify minimum technical criteria and administrative procedures for storm water management programs.<sup>115</sup> Activities exempt from these regulations include permitted deep surface mining operations, harvesting of agricultural crops, single family residences and land development programs which disturb less than one acre of land.<sup>116</sup>

The Virginia Soil and Water Conservation Board has proposed revised erosion and sediment control regulations which will repeal Virginia Regulation 625-01-01.<sup>117</sup> The purpose of the proposed regulations is to establish minimum standards for the control of soil erosion, sediment, deposition and non-agricultural runoff from land disturbing activities.<sup>118</sup> Land disturbing activities include, but are not limited to, clearing, grading, excavating, transporting and filling of land. These minimum standards must be met in local erosion and sediment control programs, and also by state agencies

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110. *Id.*

111. VA. CODE ANN. § 62.1-44.34:11(B) (Cum. Supp. 1990).

112. 6:12 Va. Regs. Reg. 1733 (1990).

113. *Id.* at 1735, § 1.4.

114. *Id.* at 1734, § 1.3.

115. *Id.* at 1735, § 2.1.

116. *Id.* § 1.4(B).

117. 6:14 Va. Regs. Reg. 2102 (1990).

118. *Id.* at 2104, § 1.3.

that conduct land disturbing activities.<sup>119</sup>

The SWCB has proposed water resource regulations which will establish standards for the Virginia Water Protection Permit ("VWPP").<sup>120</sup> As discussed previously, VWPP will replace section 401 certification required pursuant to the Federal Clean Water Act and will be required for the same activities for which section 401 certification is presently required.<sup>121</sup> The only significant difference between the new VWPP program and the present section 401 certification is that, unlike section 401 certification, the VWPP is expressly authorized to contain conditions on water withdrawals.

The SWCB established a very controversial standard for dioxin in surface water; the ambient concentration cannot exceed 1.2 parts per quadrillion (ppq) based upon a risk level of 10<sup>-5</sup> and a potency of 1.75 x 10<sup>4</sup> (mg/kg-day)<sup>-1</sup>.<sup>122</sup> The standard became effective on July 18, 1990. The dioxin standard is less stringent than the EPA criteria for dioxin. This has prompted considerable criticism and a law suit from environmentalists.<sup>123</sup>

### C. *Judicial Activities*

#### 1. Federal Courts

In *Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.*,<sup>124</sup> the Fourth Circuit held that evidence supported the district court's finding of "ongoing violations" of defendant's National Pollutant Discharge Elimination System ("NPDES") permit. The court also held that the Chesapeake Bay Foundation ("CBF") had standing to request civil penalties for violations of defendant's permit limitations and that the "ongoing violations" presented a live controversy. The court, however, held that the district court lacked jurisdiction to impose penalties for the permittee's "wholly past

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119. *Id.* at 2107, §§ 1.9, -10.

120. VA. CODE ANN. § 62.1-44.15:5 (Cum. Supp. 1990).

121. *See infra* text accompanying note 104.

122. 6:19 Va. Regs. Reg. 3085 (1990).

123. On July 5, 1990, the Environmental Defense Fund filed a petition for appeal of the dioxin standard, alleging that SWCB failed to incorporate in the standard protection against short-term health effects, aquatic-life effects, and bioaccumulation of dioxin in fish tissue. The petition also states that the SWCB adopted a standard that was economically and technologically feasible and measurable by current analytical methods. *Environmental Defense Fund v. State Water Control Board*, No. CH90A00731 (Richmond Cir. Ct. July 5, 1990).

124. 890 F.2d 690 (4th Cir. 1989).

chlorine violations."<sup>125</sup>

CBF brought its original action under the citizens suit provision of the Federal Clean Water Act.<sup>126</sup> CBF sought injunctive relief and civil penalties alleging that Gwaltney violated the total Kjeldahl nitrogen ("TKN") and chlorine limitations in its NPDES permit. Initially, the district court found that CBF had standing to bring the suit, that the court had subject matter jurisdiction, and that Gwaltney was liable for its past violations of TKN and chlorine limitations. The district court imposed a civil penalty of \$1,285,322 with interest, of which \$289,822 was for violations of Gwaltneys total TKN limit, and \$995,500 was for violations of its chlorine limit.<sup>127</sup>

Gwaltney appealed the decision to the Fourth Circuit which affirmed the district court's finding that section 1365 of the Clean Water Act conferred jurisdiction for citizens suits based wholly on past violations. The United States Supreme Court granted certiorari on the issue of jurisdiction and held that section 1365 does not permit citizen suits for "wholly past violations."<sup>128</sup> The Supreme Court remanded the case to the Fourth Circuit to consider whether CBF had made a good faith allegation of "ongoing violations," holding that such would be sufficient to establish subject matter jurisdiction.<sup>129</sup> The Fourth Circuit in turn remanded the case to the district court for further findings as to whether CBF proved an "ongoing violation" at trial. The district court found that CBF had proved "ongoing violations" and reinstated its original judgment of \$1,285,322 in civil penalties.<sup>130</sup> Gwaltney appealed the decision alleging that there was insufficient evidence to support the decision of "ongoing violations," that CBF lacked standing and that the case was moot. Gwaltney further claimed that the court erred in reinstating penalties for chlorine as well as TKN violations.<sup>131</sup>

On appeal, the Fourth Circuit held that although Gwaltney was in compliance with both TKN and chlorine limitations at the time of suit, an "ongoing violation" could also be found if "at the time suit was brought there was a reasonable likelihood that this past

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125. *Id.* at 692.

126. 33 U.S.C. § 1365 (1988).

127. *Gwaltney*, 890 F.2d at 692.

128. *Id.*

129. *Id.*

130. *Id.* at 692-93.

131. *Id.* at 693.



polluter would continue to pollute in the future."<sup>132</sup> The Fourth Circuit affirmed the district court's finding that there was sufficient likelihood of future violations of the TKN limitations, and that there was an "ongoing violation" of TKN levels. The court, however, found that it was "absolutely clear" that there were no ongoing chlorine violations at the time the suit was brought.<sup>133</sup>

The Fourth Circuit rejected Gwaltney's assertion that CBF lacked standing because the relief it requested—civil penalties—could not redress CBF's injury. The court stated that payments of civil penalties are causally related to a citizen-plaintiff's injury and are therefore likely to address the injury.<sup>134</sup>

Finally, in addressing the mootness issue, the court held that the case was not moot merely because the litigation related to penalties imposed for past violations and the primary subject matter jurisdiction was based on alleged continuing violations. According to the court, the penalty factor keeps controversies between plaintiffs and defendants alive in a citizen suit even though defendant has come into compliance and even though the ultimate judicial remedy is imposition of civil penalties assessed for past acts of pollution.<sup>135</sup>

The court, however, vacated the district court's imposition of civil penalties for chlorine violations because there was no evidence of "ongoing violations" of chlorine limitations. Because the court lacked subject matter jurisdiction with respect to the chlorine violations, the court considered it inappropriate to impose penalties for past chlorine violations.<sup>136</sup>

In *Westvaco Corp. v. Environmental Protection Agency*,<sup>137</sup> the Fourth Circuit dismissed Westvaco's petitions for review of an EPA decision proposing partial disapproval of lists of "impaired waters" submitted by Virginia and Maryland pursuant to 33 U.S.C. § 1314(1)<sup>138</sup> holding that the court lacked jurisdiction to review EPA's decision.<sup>139</sup> EPA preliminarily disapproved Maryland's "B" and "C" lists and Individual Control Strategy ("ICS") because

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132. *Id.* at 695.

133. *Id.* at 697.

134. *Id.* at 695.

135. *Id.* at 696.

136. *Id.* at 698.

137. 899 F.2d 1383 (4th Cir. 1990).

138. 33 U.S.C. § 1314(1) (1988).

139. *Westvaco*, 899 F.2d at 1389.

Maryland did not include the north branch of the Potomac River on its "B" List and Westvaco's Luke Mill on its "C" List, and because it failed to submit an ICS for that point source of dioxin. EPA preliminarily disapproved Virginia's "B" and "C" lists and ICS because Virginia did not include the Jackson River on its "B" list, and Westvaco's Covington Mill on its "C" list, and because it did not submit an ICS for that point source of dioxin.<sup>140</sup>

Westvaco petitioned for review challenging EPA's preliminary disapprovals of Maryland and Virginia's lists which Westvaco contended might affect its Luke and Covington Mills. Westvaco asserted that EPA's disapproval constituted a "reviewable agency action" under 33 U.S.C. §§ 1369(b)(1)(D) and 1369(b)(1)(E).<sup>141</sup> Westvaco contended that EPA's disapproval constituted reviewable agency action for the following reasons: (1) the disapproval constituted an "implicit determination" of general failure to perform the obligation to protect water quality imposed by 33 U.S.C. § 1312(a); (2) disapproval constituted a "determination" that the affected states' water quality standards are inadequate, which is in turn a determination as to a state program submitted under 33 U.S.C. 1342(b)(3); (3) the disapproval amounted to the promulgation of enforceable remedial measures for the two mills; and (4) EPA's disapproval was the "promulgation of effluent limitations."<sup>142</sup>

The court rejected all of these arguments, holding that it lacked jurisdiction to review EPA's decision. According to the court, Westvaco must await final EPA disapproval of the "B" and "C" lists.<sup>143</sup>

In *State of North Carolina v. Hudson*,<sup>144</sup> North Carolina, a river basin association, and several counties in Virginia and North Carolina challenged the issuance of a permit by the Army Corps of Engineers (the "Army Corps") to the City of Virginia Beach to construct a water pipeline. On further appeal, the district court upheld the issuance of the permit finding that the Army Corps did

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140. *Id.* at 1386.

141. 33 U.S.C. § 1369(b)(1)(D) gives the court jurisdiction to review agency action "in making any determination as to a State program under 33 U.S.C. § 1342(d). 33 U.S.C. § 1369(b)(1)(E) gives the court jurisdiction to review agency action in approving or promulgating any effluent limitations or other limitations under the Federal Clean Water Act.

142. *Westvaco*, 899 F.2d at 1387-89.

143. *Id.* at 1389.

144. 731 F. Supp. 1261 (E.D.N.C. 1990).

not act "arbitrarily or capriciously" in concluding that an Environmental Impact Statement ("EIS") was not necessary.<sup>145</sup>

The City of Virginia Beach had sought permission from the Army Corps to construct a sixty-inch pipeline across southern Virginia from Lake Gaston to Virginia Beach for the purpose of meeting its municipal water supply needs. After the Army Corps decided to issue the permit, the above-mentioned groups brought suit requesting judicial review of the Army Corps' decision. After the court reviewed the decision of the Army Corps pursuant to the Administrative Procedure Act,<sup>146</sup> it remanded the case to the Corps, instructing the Corps to: (1) make an independent assessment of the effect of the project on striped bass to determine whether an EIS is required; and (2) to make a determination as to the extent of Virginia Beach's water needs.<sup>147</sup>

At issue on further appeal was whether the Army Corps properly considered the effect on striped bass and Virginia Beach's water needs in compliance with NEPA in reaching its decision to approve the permit. The court stated that in reviewing whether the Army Corps decision should be upheld, the reviewing court shall:

(2) hold unlawful and set aside agency action, findings and conclusions found to be—

(a) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;

(D) without observance of procedure required by law.<sup>148</sup>

The court further stated that in applying the "arbitrary and capricious" standard to NEPA determinations, the court must "determine whether the agency, in its conclusions, made a good faith judgment after considering all relevant factors, including possible alternatives or mitigative measures."<sup>149</sup>

Finding that the Army Corps had taken a "hard look" at the environmental consequences, including the effect on striped bass

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145. The National Environmental Policy Act (NEPA) requires federal agencies to prepare an Environmental Impact Statement for every major federal action significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(c) (1988).

146. 5 U.S.C. § 706 (1988).

147. *Hudson*, 731 F. Supp. at 1262.

148. *Id.* at 1268 (quoting 5 U.S.C. § 706(2)(a)(D)).

149. *Id.*

and Virginia Beach's water needs, the district court held that the Army Corps had complied with the NEPA requirements.<sup>150</sup>

In *Fiscella & Fiscella v. United States*,<sup>151</sup> the federal district court dismissed a land developer's suit to enjoin the Army Corps from asserting jurisdiction, by way of a cease-and-desist order, over a development site containing wetlands. The developer alleged that the court had jurisdiction to enjoin the order pursuant to the Federal Declaratory Judgment Act,<sup>152</sup> and the federal question statute.<sup>153</sup>

In rejecting the land developer's petition to enjoin the Corps' cease-and-desist order, the court found that the enforcement provisions of the Federal Clean Water Act ("FCWA")<sup>154</sup> supplemented by the citizens-suit provision of the FCWA<sup>155</sup> do not provide a remedy to a private party plaintiff. The court also rejected plaintiff's assertion that the court had jurisdiction pursuant to 33 U.S.C. § 1365(a)(2), which provides a cause of action against EPA where there is an alleged failure of EPA to perform a duty under 33 U.S.C. § 1313(d). Finally, the court rejected plaintiff's assertion that the "savings clause" of 33 U.S.C. § 1365(e)<sup>156</sup> coupled with the federal question statute provides an independent remedy for injured parties. Accordingly, the court concluded that the FCWA did not provide plaintiffs with a cause of action nor did it afford plaintiffs an implied right of action.<sup>157</sup>

Alternately, the court found that plaintiffs' attempt to enjoin the Army Corps from asserting jurisdiction constituted pre-enforcement review which encroached on the duties and expertise of the Army Corps in a matter inconsistent with the enforcement scheme of the FCWA.<sup>158</sup> Furthermore, the court held that plaintiffs attempt to seek pre-enforcement review "constitutes an end-run around the Administrative Procedures Act."<sup>159</sup>

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150. *Id.* at 1273.

151. 717 F. Supp. 1143 (E.D. Va. 1989).

152. 28 U.S.C. §§ 2201, 2202 (1988).

153. 28 U.S.C. § 1331; *Fiscella*, 717 F. Supp. at 1144-45.

154. 33 U.S.C. § 1319 (1988).

155. 33 U.S.C. § 1365.

156. *Id.* § 1365(e) states that, "Nothing in this section shall restrict any right which any person . . . may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief. . . ."

157. *Fiscella*, 717 F. Supp. at 1146.

158. *Id.* at 1146-47.

159. *Id.* at 1147.

In *United States v. Hobbs*<sup>160</sup> the federal district court in a memorandum opinion held that 28 U.S.C. § 2462<sup>161</sup> was the proper statute of limitations in an action for civil penalties and injunctive relief brought by the Army Corps.<sup>162</sup> The Army Corps sought injunctive relief and civil penalties against defendants for placing fill materials into the waters of the United States without obtaining a permit from the Army Corps.<sup>163</sup>

Defendants asserted that the federal five year statute of limitations of 28 U.S.C. § 2462 was only applicable if the court determined that Virginia's one-year statute of limitations did not apply.<sup>164</sup> The court rejected defendants argument stating that the property inquiry is not whether the Virginia's one-year statute of limitations is applicable, but instead, which statute of limitations is the most appropriate.<sup>165</sup> Finding that the applicable federal statute exists and that the applications of Virginia's one-year statute of limitations would frustrate national policy, the court held that the federal five-year statute was the most appropriate limitations period to be applied with respect to the civil penalties.<sup>166</sup>

The court further held that the violations accrued when they were reported to EPA. Thus, the statute of limitations did not begin to run until a violation was first reported, and therefore plaintiff's action for civil penalties was not time-barred. The court expressly rejected defendants assertion that the violations first accrued when they actually occurred.<sup>167</sup>

With respect to injunctive relief, the court found that neither statute of limitations applied and that such action could only be time-barred by the doctrine of laches.<sup>168</sup> Finding no evidence in the record of lack of diligence by the plaintiff in commencing the action, the court held that the claim for injunctive relief was not

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160. 736 F. Supp. 1406 (E.D. Va. 1990).

161. 28 U.S.C. § 2462 (1988) provides: "Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued. . . ."

162. The FCWA does not have a statute of limitations.

163. *Hobbs*, 736 F. Supp. at 1406.

164. VA. CODE ANN. § 8.01-248 (Repl. Vol. 1977) provides: "Every personal action, for which no limitation is otherwise prescribed, shall be brought within one year after the right to bring such action has accrued."

165. *Hobbs*, 736 F. Supp. at 1409.

166. *Id.*

167. *Id.* at 1409-10.

168. *Id.* at 1410.

barred by the doctrine of laches.<sup>169</sup>

## 2. Virginia State Courts

In addition to federal court decisions, several state court cases in the past year addressed important environmental issues. The Supreme Court of Virginia in *Zapulla v. Crown*,<sup>170</sup> ruled that the Virginia Marine Resources Commission ("VMRC") lacked authority to determine rights of landowners who claimed riparian rights in waters of a creek, and thus the VMRC's issuance of a permit for additional marina construction was not res judicata as to a subsequent suit brought in equity for a determination of riparian rights. Therefore, the supreme court held that plaintiff's failure to appeal the VMRC's decision did not give rise to the defense of laches.<sup>171</sup> In addition, the court held that the VMRC was not a necessary party in the suit involving a dispute between a marina owner and an adjoining landowner regarding the riparian rights of the waters of a creek.<sup>172</sup>

Subsequent to the VMRC's decision to issue a marina owner a permit for additional construction, an adjoining landowner brought a bill in equity for a declaratory judgment as to the extent of right of enjoyment along the creek's line of navigability and an allocation of his proper share of the underwater flats between the line and shoreline. The Circuit Court of Middlesex County sustained the marina owner's demurrer and motion to dismiss on grounds that no appeal had been taken from the VMRC's decision within the time required and that the VMRC's decision was res judicata with respect to riparian rights. The adjoining landowner appealed.<sup>173</sup>

On appeal, the marina owner asserted that the VMRC's decision to issue a permit for construction to the marina was res judicata with respect to the issues raised in the plaintiff's bill of complaint and that because no appeal was taken from the VMRC's decision, it was final and not subject to collateral attack.

In reversing the circuit court's dismissal of plaintiff's bill of complaint, the court reasoned that the VMRC's issuance of a permit

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169. *Id.*

170. \_\_\_ Va. \_\_\_, 391 S.E.2d 65 (1990).

171. *Id.* at \_\_\_, 391 S.E.2d at 68.

172. *Id.*

173. *Id.* at \_\_\_, 391 S.E.2d at 66.

for construction solely determines the rights of an applicant vis-a-vis the Commonwealth and the public, and a court of equity "has sole jurisdiction to resolve conflicting private riparian claims."<sup>174</sup>

Because the VMRC lacked authority to determine riparian rights, its action in granting a permit had no res judicata effect on the case before the court and did not confer any vested rights on the marina owner vis-a-vis other property owners. The Supreme Court further reasoned that because the VMRC decision did not have any effect on private rights, the complainants failure to appeal the decision under the Administrative Process Act did not give rise to the defense of laches and the VMRC is neither a necessary nor a proper party to the action.<sup>175</sup>

The Court of Appeals of Virginia in *State Water Control Board v. Appalachian Power*<sup>176</sup> affirmed the trial court's invalidation of the State Water Control Board's ("SWCB") 1987 chlorine water quality standards and designation of outstanding resource waters.<sup>177</sup> In 1987, as part of its triennial review,<sup>178</sup> the SWCB had attempted to amend its chlorine standard to prohibit the use of chlorine or other halogen compounds by any facility that discharges at least 20,000 gallons of effluent per day into state waters inhabited by endangered or threatened species of aquatic life, and to designate a 121 mile section of the Clinch River as an essential or critical habitat for several species. Appalachian Power Company ("APCO"), which operates a steam electric power plant within the designated area of the Clinch River, appealed the adoption of the standards to the Circuit Court of Roanoke pursuant to sections 62.1-44.24 and 9-6.14:16 of the Code. The circuit court ruled that the standards were invalid because the SWCB failed to hold an evidential hearing prior to amending the water quality standards as required by section 9-6.14:8 of the Code.<sup>179</sup>

The SWCB appealed the decision. The SWCB asserted that it had satisfied the statutory requirement for an evidential hearing by providing APCO an opportunity to request an evidential hear-

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174. *Id.* at \_\_\_, 391 S.E.2d at 67.

175. *Id.* at \_\_\_, 391 S.E.2d at 68.

176. 9 Va. App. 254, 386 S.E.2d 633 (1989).

177. *Id.* The regulations were declared invalid pursuant to VA. CODE ANN. § 9-6.14:19, VR 325-01-1, § 13 (1987) and VR 680-21-07.2 (1987).

178. VA. CODE ANN. § 62.1-44.15(3a) (Repl. Vol. 1987) mandates that the SWCB conduct a triennial review of its water quality standards and amend them where necessary to fulfill its duty to protect and restore the state's waters.

179. *State Water Control Board*, 9 Va. App. at 256-58, 386 S.E.2d at 634-35.

ing. Alternatively, SWCB contended that APCO was not harmed by the failure of the SWCB to hold the hearing.<sup>180</sup>

The Court of Appeals of Virginia, however, found that the SWCB's basic law, section 62.1-44.15(3a) of the Code, specifically states that the SWCB shall hold hearings before it promulgates its water standards, and further, that the Administrative Process Act defines "hearing" as "(i) opportunity for private parties to submit factual proofs in formal proceedings as provided as in § 9-6.14:8 of this chapter in connection with the making of regulations. . . ."<sup>181</sup> Thus, the court concluded that the SWCB's basic law in conjunction with the Administrative Process Act required the SWCB to conduct a formal hearing to receive probative evidence prior to the adoption of new water quality standards.<sup>182</sup> The court noted that when an agency fails to conform to the required statutory authority when enacting its regulations, the affected party may successfully challenge the regulations without having to show that it was harmed by the agency's failure to comply with the law.<sup>183</sup>

Some of the most publicized proceedings of the year involved Avtex Fibers, which allegedly discharged Polychlorinated Biphenyls ("PCB's") into the Shenandoah River. The Commonwealth filed temporary restraining orders in September and October of 1989 resulting in the issuance of two orders restricting Avtex's discharges by the Circuit Court of Richmond. Following issuance of these orders, the SWCB convened a formal hearing and decided to revoke Avtex's National Pollutant Discharge Elimination System ("NPDES") permit. In *Commonwealth v. Avtex Fibers*,<sup>184</sup> the Circuit Court of Richmond issued orders on September 27, 1989 and October 13, 1989 which significantly restricted Avtex Fibers' operations. The Commonwealth issued the orders in response to evidence of continued discharges of PCB's into the Shenandoah River.<sup>185</sup> The initial order enjoined Avtex from using its storm water drainage system until it was cleaned and cleared of any PCB contamination. The injunction also required Avtex to conduct daily monitoring for PCB's at its stormwater drainage system and

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180. *Id.* at 256, 386 S.E.2d at 634.

181. *Id.* at 260, 386 S.E.2d at 636 (quoting VA. CODE ANN. § 9-6.14:4(E) (Cum. Supp. 1990)).

182. *Id.* at 261, 386 S.E.2d at 636.

183. *Id.* at 262, 386 S.E.2d at 637.

184. No. 8233 (Richmond Cir. Ct. Sept. 27, Oct. 13, 1989).

185. *Id.* (Oct. 13, 1989).



to initiate monitoring for PCB's at its wastewater treatment system discharge.<sup>186</sup>

On October 13, 1989, finding that there was ample evidence that Avtex had violated its NPDES permit, the court entered a second order enjoining all discharges from Avtex's wastewater treatment outfall.<sup>187</sup> The court, however, stated that the injunction would be suspended if Avtex posted a \$150,000 bond or other surety and there was no discharge of PCB's into the Shenandoah River from its storm water and waste water treatment outfalls. The court denied the Commonwealth's request to enjoin Avtex's operations stating that it was inappropriate for the court to punish or give final relief at the preliminary injunction stage.<sup>188</sup>

On October 30th, with the court injunctions still in effect, the SWCB convened a formal hearing for the purpose of considering whether to revoke Avtex's NPDES permit.<sup>189</sup> At the hearing, the Commonwealth made a summary presentation and proposed conclusions of law. Among the proposed conclusions were the following: (1) that Avtex had caused or permitted discharges of PCB's to state waters in violation of its NPDES permit; (2) that despite knowledge of the discharges dating back to 1985 and potential discharges dating back to 1983, Avtex failed to take all feasible steps to minimize the adverse impact to state waters resulting from its noncompliance with the permit; and (3) that Avtex had failed to timely perform and report the monitoring necessary to determine the nature and impact of the noncomplying discharge of PCB's.<sup>190</sup>

The Board reconvened on November 9, 1989, and voted to revoke Avtex's NPDES permit. The Board found that the evidence of discharges of PCB's into the Shenandoah River combined with Avtex's failure to properly mitigate, report and monitor its water discharges violated the terms of the NPDES permit, section 1.5 of the permit regulations and section 6.14(c) of the Board's regulations thereby giving the SWCB cause to revoke the permit pursuant to Va. Code § 62.1-44.15(5) and section 5.1(D) of the SWCB regulations. The revocation of its NPDES permit forced Avtex to

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186. *Id.* (Sept. 27, 1989).

187. *Id.* (Oct. 13, 1989).

188. *Id.*

189. Avtex had been issued a NPDES permit for its point source discharges from its storm water and waste water treatment outfalls into the Shenandoah River.

190. HEARING BEFORE THE STATE WATER CONTROL BOARD; PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW (Oct. 30-31, 1989).

shut down its operations.<sup>191</sup>

The circuit court in *Environmental Defense Fund v. Virginia State Water Control Board*<sup>192</sup> ruled that the Environmental Defense Fund ("EDF") did not have standing under the State Water Control Law or the Administrative Process Act to appeal a decision of the SWCB.<sup>193</sup> Rocco Farm Foods had petitioned the SWCB and was issued, after public hearings, an amended NPDES permit which provided for flow tier limitations. EDF, having participated in these public hearings, appealed the SWCB's decision to reissue and modify the Rocco permit. Also, EDF in a separate cause of action appealed the SWCB's decision to deny EDF's request for participation in a formal adjudicative-type hearing in connection with the decision to reissue Rocco's permit. At issue was whether EDF had standing to appeal either case.<sup>194</sup>

The Circuit Court of Richmond noted that the right to appeal may be exercised under both section 62.1-44.29 of the Code<sup>195</sup> and section 9-6.14:16 of the Virginia Administrative Process Act ("VAPA")<sup>196</sup> because section 62.1-44.29 does not specifically exclude a VAPA appeal.<sup>197</sup> The court stated that EDF was entitled to appeal if it could establish standing on any one of the following grounds: (1) as "an owner aggrieved" pursuant to section 62.1-44.29; (2) as a "person affected" by and claiming unlawfulness of any regulation<sup>198</sup> or (3) as a "party aggrieved" by and claiming unlawfulness of a case decision.<sup>199</sup>

The court rejected EDF's standing claim under all three theories of liability. The court found that EDF was not "an owner aggrieved" because it was not subject to the SWCB's power and jurisdiction.<sup>200</sup> The court also found that EDF, under the second theory, was not a person affected by and claiming the unlawfulness of a regulation. EDF had argued that a staff memorandum entitled "Flow Trend VPDES Limits" used by the staff in drafting modifi-

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191. HEARINGS BEFORE THE STATE WATER CONTROL BOARD FINDINGS OF FACT AND CONCLUSIONS OF LAW (Nov. 9, 1989).

192. Nos. N-7848, N-8078-3 (Richmond Cir. Ct. Apr. 25, 1990).

193. *Id.* slip op. at 2.

194. *Id.* at 2-3.

195. VA. CODE ANN. § 62.1-44.29 (Cum. Supp. 1990).

196. *Id.* § 9-6.14:16 (Repl. Vol. 1989).

197. *EDF*, Nos. N-7848-3, N-8078-3, slip op. at 3.

198. VA. CODE ANN. § 9-6.14:16 (Supp. 1990).

199. *Id.* § 9-6.14:16(A).

200. *EDF*, Nos. N-7848-3, N-8078-3, slip op. at 4.

cations to permits was an unlawful regulation which affected EDF. The court rejected this assertion and found that the memorandum was not a "regulation" as used in section 9-6.14:16, noting that it was not promulgated by nor did it bind the Board in considering whether to or not to issue the amended permit.<sup>201</sup> Finally the court found that EDF was not a "party aggrieved" by a case decision pursuant to section 9-6.14:16A. The court stated that "aggrieved parties" includes only the applicant or permittee and not members of the public, even if they are riparian owners of the stream in question who appear in connection with a permit application.<sup>202</sup>

The court further held that even if individual members of EDF could show that they were "aggrieved" by the SWCB's decisions as individuals, EDF did not have standing to appeal the decision on behalf of them in a representative capacity. According to the court, only if EDF was *directly* aggrieved by a board action would it have standing as a separate entity to appeal the decision.<sup>203</sup>

In *South Wales Utility, Inc. v. State Water Control Board*,<sup>204</sup> the court gave summary judgment to plaintiffs holding that pending land use litigation should not prevent the SWCB from acting on a completed permit application. South Wales had applied for a VPDES permit for its proposed sewage treatment plant to the SWCB. The SWCB denied the permit until resolution of litigation in the Circuit Court of Culpeper regarding whether plaintiff's proposed sewage treatment plant complied with Culpeper County land use ordinances and whether the certification of compliance with local land use ordinances was sufficient.<sup>205</sup>

The court found that under section 62-1-44.19(2) of the Code, once the SWCB had determined that the permit application was complete, the SWCB should have acted on the application. The court noted that the SWCB could have chosen to delay determining that the application was complete until the litigation was concluded in the trial court thereby allowing the SWCB to delay acting on the permit. The SWCB, however, admitted in its answer to South Wales' petition for appeal that it deemed South Wales' application complete. Therefore, SWCB was required to decide on

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201. *Id.*

202. *Id.* at 5.

203. *Id.* at 5-6.

204. No. 161-C-89 (Culpeper County Cir. Ct. Mar. 30, 1980).

205. *Id.*, slip op. at 2.

the merits whether to approve the application.<sup>206</sup>

On remand, the court ordered the SWCB to decide whether to issue the permit based on South Wales' prior application, supplemented by additional information or review as needed. The court denied South Wales' request that the court order the SWCB to issue the permit stating that the SWCB had never made a finding as to whether the permit should be issued.<sup>207</sup>

## V. ENVIRONMENTALLY SENSITIVE AREAS

### A. Legislation

The General Assembly set the civil charges that the Marine Resources Commission may order at a maximum of \$10,000, and set the civil penalty a circuit court may assess at \$25,000 for any violation of title 62.1 of the Code, and chapter 1 (Water Courses Generally)<sup>208</sup> of chapter 2.1 (Wetlands),<sup>209</sup> or of chapter 2.2 (Coastal Primary Sand Dunes),<sup>210</sup> all of title 62.1.

The General Assembly prohibited oil drilling in the Chesapeake Bay, in any designated Resource Protection Areas, within five hundred feet from the shoreline or any tributaries, or from the low water mark of the Atlantic Ocean seaward three miles, until July 1, 1992.<sup>211</sup> An environmental impact assessment is required before any permit is granted for drilling in these areas of Tidewater Virginia where the two year moratorium is not in effect.<sup>212</sup>

The penalties for taking endangered or threatened species were expanded to include penalties for taking those species which Virginia classifies as endangered or threatened under section 29.1-566.<sup>213</sup> The classification of insects was transferred from the Board of Game and Inland Fisheries to the Board of Agriculture and Consumer Services.<sup>214</sup> Threatened species were excluded from the definition of nuisance species.<sup>215</sup>

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206. *Id.*

207. *Id.*

208. VA. CODE ANN. § 62.1-9.1 (Cum. Supp. 1990).

209. *Id.* § 62.1-13.18:2.

210. *Id.* § 62.1-13.27:1.

211. *Id.* §§ 62.1-195.1 to -195.2.

212. *Id.* § 62.1-195.1.

213. *Id.* § 29.1-567 (Cum. Supp. 1990).

214. *Id.* § 3.1-1025 (Cum. Supp. 1990).

215. *Id.* § 29.1-100.

The General Assembly extended to counties, cities or towns the right to agree with a person to use his land for public recreational uses, and required that the person be held harmless from all liability for any claims arising from the use of his land.<sup>216</sup>

The time of maturity for trees was extended from ten to twenty years for purposes of the minimum tree cover requirement in subdivision or development site plans.<sup>217</sup> The ability to regulate land-disturbing activities related to single-family residences was extended to cities and counties contiguous to counties with a county executive form of government.<sup>218</sup>

A twenty-five percent tax credit was given for the purchase of advanced technology pesticide and fertilizer application equipment.<sup>219</sup>

For repair or replacement of roofing, floorcovering, or siding which may contain asbestos, the General Assembly authorized an RFS inspector to certify that no asbestos is present.<sup>220</sup> The Department of Commerce must promulgate training requirements by January 1, 1991.<sup>221</sup> Similarly, the Department must implement a plan for the issuance of asbestos project monitor's licenses by January 1, 1991.<sup>222</sup>

## B. *Administrative Proceedings*

The Chesapeake Bay Preservation Area Designation and Management Regulations adopted on September 20, 1989 became effective on October 1, 1989.<sup>223</sup> The purpose of these regulations is to protect and improve the water quality of the Chesapeake Bay through both local and state efforts. The regulations require local governments in Tidewater Virginia to adopt, through zoning and subdivision ordinances, more stringent criteria for land use and development in specifically designated areas, called Chesapeake Bay Preservation Areas ("CBPA's").<sup>224</sup> These areas are divided into

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216. *Id.* § 29.1-509(E).

217. *Id.* § 15.1-14.2(B) (Supp. 1990).

218. *Id.* § 10.1-560(10) (Supp. 1990).

219. *Id.* § 58.1-337(A) (Cum. Supp. 1990).

220. *Id.* §§ 36-99.7(B)(2), 54.1-501 (Cum. Supp. 1990).

221. *Id.* § 54.1-501(A)(3).

222. *Id.* § 54.1-502(A).

223. 6:1 Va. Regs. Reg. 11 (1989).

224. *Id.* at 14, § 3.1.

two categories: Resource Protection Areas,<sup>225</sup> which constitute more sensitive areas closer to the shore, and Resource Management Areas,<sup>226</sup> which are less sensitive upland areas that could potentially degrade water quality. Local governments are also given the option to identify as overlay "Intensely Developed Areas,"<sup>227</sup> which are allowed certain exemptions from these criteria.

The Act sets performance criteria which outline the restrictions on land use within the above designated areas. These criteria are divided into two types: general criteria that apply in all CBPA's,<sup>228</sup> and more stringent criteria that only apply in the Resource Protection Areas.<sup>229</sup> Included in this section are exemptions and exceptions to these criteria.<sup>230</sup>

The regulations also provide for local program development to show compliance with these measures in two steps to be completed in a twelve and a twenty-four month period. Within a year of the regulations' promulgation, Tidewater localities must designate CBPAs within their boundaries;<sup>231</sup> by the second year, these same localities must incorporate provisions at least as stringent as those outlined in the land use and development criteria mentioned above.<sup>232</sup> Both of these steps are subject to the approval at the state level by the Chesapeake Bay Assistance Board, a citizen board, which directs the work of the Chesapeake Bay Local Assistance Department.<sup>233</sup>

The final part of the regulations concern enforcement and establish administrative and legal procedures to secure compliance with the Act by local governments.<sup>234</sup>

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225. *Id.* § 3.2

226. *Id.* at 15, § 3.3.

227. *Id.* § 3.4.

228. *Id.* at 16, § 4.2.

229. *Id.* at 17, § 4.3.

230. *Id.* at 19, § 4.4.

231. *Id.* at 21, § 5.5(C).

232. *Id.* at 22, § 5.6.

233. *Id.* at 21-23, §§ 5.5(B) and 5.6(F).

234. *Id.* at 24, § 6.1.

